

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 03-2072 JB

ANTONIUS MARIA HEIJNEN,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the United States' Motion to Strike Defendant Heijnen's Response to Presentence Report, Or, in the Alternative, Memorandum in Support of Presentence Report, filed August 1, 2005 (Doc. 82). The primary issue is whether the Court should decline to consider Defendant Antonio Marie Heijnen's objection to the presentence report. Because Heijnen is proceeding pro se, and it is preferable to decide his concerns on the merits if possible, the Court will deny the United States' motion to strike and treat the United States' motion as a sentencing memorandum.

PROCEDURAL BACKGROUND

On July 26, 2005, Heijnen filed his Response to Presentence Report (Doc. 181) ex parte. Accordingly, Heijnen did not provide a copy of his objection to the United States. In his "Response to Presentence Report, Part 1 of 3," under the subheading "Certificate of Service," Heijnen concedes that he did not make service upon the United States.

RULE 32(f)(2)

Rule 32(f)(2) of the Federal Rules of Criminal Procedure provides that a party making objections to a Presentence Report "must provide a copy" of his objections to the United States.

ANALYSIS

Heijnen argues that he does not need to serve the United States because no one has shown to his satisfaction that the United States Attorney's Office is authorized to represent the United States of America. Heijnen thus repeats an argument that he has made consistently in the course of this case. In particular, Heijnen raised this argument in a pretrial motion to dismiss. See Defendant's Third Motion to Dismiss for Default by Plaintiff and Fraud Resulting in Lack of Jurisdiction, filed July 25, 2005 (Doc. 67).

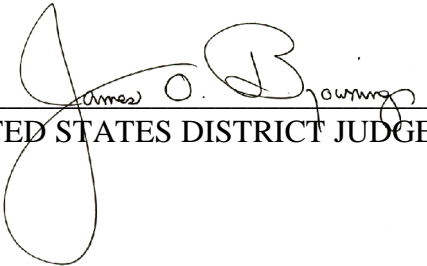
The Court held a hearing on this motion on January 31, 2005. The Court ruled from the bench. The Court, in substance, held that the United States Attorney for the District of New Mexico represented the United States of America in this action. The Court entered an Order to reflect this ruling on February 16, 2005. See (Doc. 91).

Because the Court has ruled adversely on Heijnen's argument, Heijnen need not raise the same argument before he appeals the judgment in this case. Heijnen has preserved this issue for appeal, and no doubt will seek to raise it before the United States Court of Appeals for the Tenth Circuit. He need not raise it again before the trial court. And Heijnen should not ignore the Court's ruling that the United States Attorney is his opposing party's counsel.

Heijnen's ex parte filing violates the Federal Rules of Criminal Procedure. Nonetheless, now that the Court has disclosed it to the United States, there is no prejudice to the United States. Accordingly, the Court will deny the United States' request that it strike Heijnen's response to the Presentence Report. Instead, the Court will treat the United States' motion as a sentencing memorandum and consider it with Heijnen's objection.

IT IS ORDERED that the United States' Motion to Strike Defendant Heijnen's Response

to Presentence Report, Or, in the Alternative, Memorandum in Support of Presentence Report, is denied in part and granted in part. The Court will deny the United States' request to strike the Defendant's Response. The Court will grant the United States' request that the Court treat the United States' motion as a sentencing memorandum and consider it as a response to the Defendant's objections to the Presentence Report.


UNITED STATES DISTRICT JUDGE

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